

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NEW YORK

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

NOV 10 2004

BY: JS

UNITED STATES OF AMERICA, )

Plaintiff, )

v. )

ASHLAND, INC., )

Defendant. )

CIVIL ACTION NO.

04 CV 0904 E/sn

COMPLAINT

The United States of America, by authority of the Attorney General of the United States and through the undersigned attorneys, acting on behalf of and at the request of the Chief of Engineers of the United States Army Corps of Engineers ("ACOE"), files this complaint and alleges as follows:

STATEMENT OF THE CASE

1. This is a civil action brought by the United States pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. §§ 9607, for recovery of response costs incurred and to be incurred by the United States in connection with remediating a parcel of land located in Tonawanda, New York owned by Ashland, Inc. referred to as the Ashland 2 Site.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action and the Defendant pursuant to Sections 107(a) and 113(b) of CERCLA, 42 U.S.C. §§ 9607(a) and 9613(b), and 28 U.S.C. §§ 1331 and 1345.
3. Venue is proper in this judicial district pursuant to Section 113(b) of CERCLA, 42 U.S.C.

§ 9613(b), and 28 U.S.C. § 1391, because the releases or threatened releases of hazardous substances that gave rise to the claims in this action occurred in this district.

#### DEFENDANT

4. Defendant Ashland, Inc. ("Ashland" or "Defendant") is a "person" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).
5. Defendant is incorporated in the State of Kentucky and is authorized to do business in the State of New York.
6. Defendant is an "owner" and "operator" of a "facility" at which hazardous substances were disposed and/or is an owner or operator at the time of disposal, within the meaning of Sections 101(9) and (20) and 107(a)(1) and (2) of CERCLA, 42 U.S.C. §§ 9601(9) and (20) and 9607(a)(1) and (2).

#### THE SITES

7. Ashland owns two parcels of land located in Tonawanda, New York, referred to as the Ashland 1 and the Ashland 2 Sites. The Ashland 1 Site is located on River Road in Tonawanda, New York, just north of the City of Buffalo and occupies approximately 11 acres. The Ashland 2 Site is located at 4545 River Road in Tonawanda, New York, in close proximity to the Ashland 1 Site, and occupies approximately 115 acres. The Ashland 1 and Ashland 2 sites are bounded by commercial and industrial properties.
8. In November of 1942, the United States entered into a contract with the Linde Air Products Company ("Linde") for the construction and operation of a plant to manufacture black oxide,  $U_3O_8$ , by removing uranium from ore and refining it. During that process, low activity radioactive residues were created. Pursuant to that contract, the United States also directed Linde to acquire a location where Linde could transport the low activity radioactive residues for temporary storage. On June 23, 1943 Linde leased the property now referred to as the Ashland 1 Site for the required storage. The lease gave Linde the right to assign the lease to the United States and to purchase the property. On

June 28, 1944, Linde assigned the lease to the United States and on August 21, 1944, the United States purchased the Ashland 1 Site.

9. In 1960, the United States, through the General Services Administration, sold the Ashland 1 Site to Ashland Oil and Refining Company, Inc.. The transfer was made via quitclaim deed without warranty. After purchasing the Ashland 1 Site, the company changed its name to Ashland Oil, Inc. and then to its current name, Ashland, Inc. Ashland remains the current owner of Ashland 1. At times since 1960, Ashland Chemical, a wholly owned subsidiary of Ashland, has operated the Ashland 1 Site in connection with oil refinery operations.
10. In 1974, Ashland built two petroleum product storage tanks and constructed a bermed area and drainage ditch on the Ashland 1 Site in the area where the United States had disposed of low activity radioactive residues. During the construction activities, Ashland redistributed and spread the low activity radioactive residues on the Ashland 1 Site to locations at which it had not previously been disposed as well as to an area called Seaway D which is immediately adjacent to the Ashland 1 property line. Ashland also transported some of the low activity radioactive residues from the Ashland 1 Site to a nearby site also owned by Ashland now referred to as the Ashland 2 Site and to the adjacent site not owned by Ashland called Seaway D. Between 1974 and 1982, Ashland Chemical transported about 6,000 cubic yards of excavated soil mixed with low activity radioactive residues from the Ashland 1 Site to the Ashland 2 Site and the Seaway D area. At the Ashland 2 Site, the low activity radioactive residues were placed adjacent to, and were also used as cover material for at least a portion of, a landfill that Ashland Chemical used for disposal of general plant refuse and chemical and industrial by-products.
11. By removing the low activity radioactive residues from the Ashland 1 Site to the Ashland 2 Site, Ashland increased the volume of material that needed to be excavated and disposed of off-site and increased the amount of response costs that the United States

needed to incur compared to the amount that would have been necessary had Ashland not moved the low activity radioactive residues from the Ashland 1 Site to the Ashland 2 Site.

#### RESPONSE ACTIONS TAKEN AT THE SITE

12. Beginning in April of 1988, the Department of Energy ("DOE") undertook a Remedial Investigation ("RI") of the Ashland 1 and Ashland 2 sites. DOE completed the RI in February 1993 and concluded that contaminants present at the Ashland 1 and Ashland 2 sites and on Seaway D posed an unacceptable risk to some potential future users of the sites and exceeded the guidelines for release of the Sites for use without radiological restrictions. The RI identified uranium Ra-226 and Th-230 and metals associated with the low activity radioactive residues as the primary contaminants of concerns at the Ashland 1 and Ashland 2 sites. Uranium Ra-226 and Th-230 are "hazardous substances" within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).
13. DOE completed a Feasibility Study in November 1993, which set forth the alternatives for addressing the contamination at the Ashland 1 and Ashland 2 sites and at Seaway D. DOE performed the RI and FS pursuant to the Formerly Utilized Sites Remedial Action Program ("FUSRAP"). Effective October 13, 1997, Congress transferred funding for implementation of the Formerly Utilized Sites Remedial Action Program to ACOE in the Fiscal Year 1997 Energy and Water Appropriations Act. On April 20, 1998, ACOE issued a Record of Decision for the Sites in which ACOE selected the remedy to address the release or threat of release of hazardous substances at or from the Ashland 1 and Ashland 2 sites.
14. Beginning on May 22, 1998, in response to a release or a substantial threat of a release of hazardous substances at or from the Sites, ACOE commenced the remedy selected in the ROD comprised of the excavation and off-site disposal of the material contaminated with the low activity radioactive residuals found at the Ashland 1 and Ashland 2 sites. The

remedy selected in the ROD for the Ashland 1 and Ashland 2 sites is largely completed and ACOE removed and disposed of approximately 142,383 cubic yards of material containing low activity radioactive residues from the Ashland 1 Site and Seaway D Site and 45,500 cubic yards of material containing low activity radioactive residues from the Ashland 2 Site at the International Uranium Corporation facility in Utah, which was granted a Nuclear Regulatory Commission License Amendment to take possession of the material containing low activity radioactive residues for use as alternate feed material.

15. ACOE has incurred response costs in connection with its response actions at the Sites of approximately \$94,145,119.00, comprised of approximately \$71,000,000 incurred on response actions at the Ashland 1 Site and Seaway D Site and \$23,145,119.00 incurred on response actions at the Ashland 2 Site.
16. The United States continues to incur response costs in connection with the Ashland 1 and Ashland 2 sites.

#### CLAIM FOR RELIEF

17. Paragraphs 1 through 16 are realleged and incorporated herein by reference.
18. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides, in pertinent part:
  - (a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section --
    - (1) the owner and operator of a vessel or a facility,
    - (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
    - (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
    - (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for --
      - (A) all costs of removal or remedial action incurred by the United States

Government ... not inconsistent with the national contingency plan ....

19. The Ashland 2 Site is a "facility" as defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).
20. The Defendant is a "person" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21), who is the current owner or operator of a facility at which hazardous substances were disposed of, and/or at the time of disposal of a hazardous substance owned or operated a facility at which such hazardous substances were disposed of, within the meaning of Section 107(a) (1) and (2) of CERCLA, 42 U.S.C. § 9607(a) (1) and (2).
21. There have been "releases" or threatened "releases" of "hazardous substances" into the "environment" at the Ashland 2 Site, as those terms are defined in Section 101(8), (14) and (22) of CERCLA, 42 U.S.C. § 9601(8), (14), and (22).
22. Hazardous substances, within the meaning of CERCLA Section 101(14), 42 U.S.C. § 9601(14), have been found at the Ashland 2 Site.
23. The actions taken, and to be taken, by the United States in connection with the Ashland 2 Site constitute "response actions" within the meaning of Section 101(25) of CERCLA, 42 U.S.C. § 9601(25).
24. The costs incurred by the United States in connection with the Ashland 2 Site were incurred in a manner not inconsistent with the National Contingency Plan ("NCP"), which was promulgated under Section 105(a) of CERCLA, 42 U.S.C. § 9605(a), and is codified at 40 C.F.R. Part 300 et seq.
25. Pursuant to Section 107(a)(1) and (2) of CERCLA, 42 U.S.C. § 9607(a)(1) and (2), Defendant is liable for the response costs incurred and to be incurred by the United States at the Ashland 2 Site.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, the United States of America, respectfully prays that this

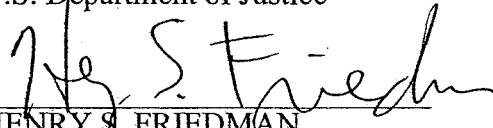
Court:

1. Enter judgment in favor of the United States and against Defendant for response costs incurred by the United States in connection with the Ashland 2 Site, plus interest;
2. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

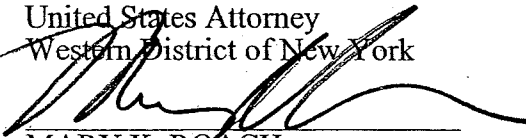


THOMAS L. SANSONETTI  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice



HENRY S. FRIEDMAN  
SUSAN M. AKERS  
Senior Attorneys  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Ben Franklin Station  
Washington, DC 20044  
(202) 514-5268  
(202) 514- 4831

MICHAEL A. BATTLE  
United States Attorney  
Western District of New York



MARY K. ROACH  
Assistant United States Attorney  
United States Attorneys Office  
138 Delaware Ave.,  
Buffalo, N.Y. 14202

OF COUNSEL:

MICHELLE BARCZAK  
Assistant District Counsel  
U.S. Army Corps of Engineers  
Buffalo District  
Office of Counsel